APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

1889
April 2.

JITU LAL MAHTA (DEFENDANT) *v.* BINDA BIBI (PLAINTIFF).*

Succession Act (X of 1865), s. 96—Hindu Wills Act (XXI of 1870), ss. 2, 3—Lapsed Legacy—Lapse of gift to testator's lineal descendant—Probate and Administration Act (V of 1881), s. 131.

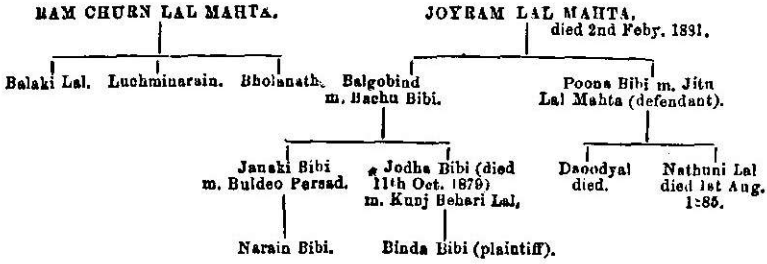
A testator, by his will dated the 22nd April 1878, gave a legacy of Rs. 5,000 to his son's daughter Jodha, to be paid to her out of a certain sum owing to the testator by the Rajah of Bettia.

The testator died on the 2nd February 1881, and Jodha in October 1879; the money due by the Rajah of Bettia was realized on the 7th December 1884. Jodha left an only child Binda, who was born before the death of the testator.

Binda sued to recover the legacy left to her mother; the defence was that the legacy had lapsed. *Held*, that Jodha was, in point of law, within the meaning of s. 96 of the Succession Act, a person in existence at the death of the testator, because a lineal descendant of her's survived the testator.

ONE Joyram Lal Mahta, by his last will and testament, dated the 22nd April 1878, gave his property to the two sons of his daughter Poona Bibi, subject to a bequest of Rs. 5,000 to Jodha Bibi, the second daughter of his deceased son, Balgobind Mahta. Jodha Bibi died in 1879, and the testator on the 2nd February 1881.

The following is a geneological tree of the families of Joyram Lal Mahta and his brother :—



* Appeal from Original Decree, No. 97 of 1888, against the decree of Baboo Grish Chunder Chatterjee, Subordinate Judge of Tirhoot, dated the 15th of February 1888.

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The testator's will contained, amongst others, the following clause: "As a matter of favour, I made up my mind to give some cash to the following men and women; but at present being ill and short of money, I am unable to realize my desire, which I therefore express here, and strictly enjoin my daughter's sons that, upon realization of the principal and interest due to me from the Maharajah of Bettia under a bond, they should first liquidate the debts due from me, and then, after paying these debts, they should pay to the following persons the sums fixed by me for them as shown against their names :—

(1.) To Ram Churn Lal Mahta, elder brother, if he be living, and, if he be dead, to his sons and grandsons, on consideration of their being heirs of the said Ram Churn Lal Mahta ... Rs. 7,000.

(2.) To Bachu Bibi, widow of my son ... Rs. 6,000.

(3.) To Janaki Bibi, wife of Buldeo Persad, my eldest grand daughter ... Rs. 6,000.

(4.) To Jodha Bibi, my younger granddaughter and wife of Kunj Behari Lal ... Rs. 5,000.

The bond debt, referred to in the testator's will, was realized by Jitu Lall, in full, on the 7th December 1884.

Davodyal predeceased the testator; Binda Bibi being born previous to the 2nd February 1881.

Binda Bibi, not having been paid the sum of Rs. 5,000, which was expressed to have been given by the testator to her mother, through her guardian, Kunj Behari Pershad, on the 23rd November 1887, gave notice to Jitu Lal that, if the principal with interest were not paid within five days, she would bring a suit to recover the sum. No payment having been made on the expiration of the period mentioned, she brought, by her next friend, Kunj Behari Pershad, the present suit for recovery of Rs. 6,780 against Jitu Lal.

The defendant contended that the legacy had lapsed, Jodha Bibi having died before the testator.

The Subordinate Judge held that it was the intention of the testator to make an absolute gift of the sum of Rs. 5,000 to Jodha Bibi, and that the exception to the general rule, as to

lapsed legacies, laid down in s. 96 of the Succession Act, applied, and that, therefore, the plaintiff being a lineal descendant of the testator was entitled to recover. A decree was, therefore, given in favour of the plaintiff for the sum of Rs. 5,000 with interest at 6 per cent.

The defendant appealed to the High Court.

Mr. *Evans* (with him Baboo *Mohesh Chunder Chowdhry* and Baboo *Taruck Nath Palit*), for the appellant.

Mr. *Woodroffe* (with him Baboo *Hem Chunder Banerjee* and Baboo *Umakali Mookerjee*), for the respondent.

Mr. *Evans*.—Even supposing s. 96 of the Indian Succession Act to apply to the case, it being clearly the intention of the testator, inferable from the entire will, that the legacy to Jodha Bibi should lapse in the event of her predeceasing him, the decree of the Judge was wrong; though s. 2 of the Hindu Wills Act makes s. 96 of the Succession Act applicable to the will of Hindus generally, yet, having regard to s. 3, s. 96 cannot operate so as to prevent a lapse of the legacy. If it did, it would be contrary to the rule laid down in the *Tagore case* (1)—See *Alangamonjori Dabee* v. *Sonamoni Dabee* (2). The effect of applying it would be to make it possible that a gift by will should take effect at the death of the testator in favour of a person not then in existence, and to enable the heir of the deceased donee or a creditor of the deceased donee to claim it as assets of the donee who was not in existence when the gift took effect.

According to the principle laid down in *Alangamonjori's case* (2) this cannot be done.

It cannot be contended that Binda Bibee, the daughter of the donee, takes direct. It is clear that the creditors (if any) of the donee would have a right to have the money applied as part of the original donee's estate, in preference to creditors of Binda, or that the Official Assignee of Jodha, the original donee (if she was insolvent), would get it. "Existence in contemplation of law," spoken of in the *Tagore case*, means existence in contemplation of Hindu Law, either special texts, or on general principles.

(1) 9 B. L. R., 377. (2) I. L. R., 8 Calc., 637.

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Having regard to s. 3, it is a *petitio principii* to contend that the donee was alive in the contemplation of the law as laid down in s. 96; for the question is whether s. 3 does not prevent s. 96 operating so as to enable a Hindu, who could not take apart from that section under the principles of Hindu Law, to take by virtue of it.

Mr. *Woodroffe* for the respondent.—As to the appellant's argument on the intention of the testator—such intention would have been invalid if s. 96 applies, there would have been no necessity for providing for the grand-daughter's descendants, but there would have been necessity for providing for the brother's descendants. The case of *Alangamonjori Dabee* v. *Sonamoni Dabee* (1) does not apply, it deals with the case of an unborn person, and decides that gifts to unborn persons, which are invalid under Hindu law, have not been made valid by s. 99 of the Succession Act. The question here is not as to such a person, but is as to a gift to a person who dies before delivery is given. Hindu law does not necessarily require the donee to be a sentient person, or rather it treats as sentient beings some who ordinarily would not be so treated; for it recognizes gifts to idols; *Kumara Asima Krishna Deb* v. *Kumara Krishna Deb* (2) and *Krishnaramani Dasi* v. *Ananda Krishna Bose* (3); the offering of pindas and water to the deceased proceeding upon the principle that the will of the donor, not the acceptance of the donee, is the cause of property (*Jimuta Vahana's Dayabhaga*, ch. 1, ss., 21, 22). Further it provides for the case of the completion of gifts either to one who is dead, but erroneously supposed to be living, or to one who is living, but dies before acceptance; *Colebrooke's Digest*, Bk. V. ch. I. s. 1: *Jaganatha's* (Madras Ed.) 190. A corporation is not a sentient being, but yet gifts may be made to a municipality. The rule in the *Tagore case* does not require the donee to be a sentient person; see *Jotindra Mohun Tagore* v. *Ganendra Mohun Tagore* (4) and *Jaganatha's Digest* (Madras Ed.), 191. There is here a statutory existence, as the person is in contemplation of law in existence by virtue of

(1) I. L. R., 8 Calc., 637.
(2) 2 B. L. R., O. C., 11 (47).
(3) 4 B. L. R., 231 (258).
(4) 9 B. L. R., 377 (400).

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s. 96, and in this way the uncompleted gift is called into effect in conformity with Hindu law.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was delivered by

BANERJEE, J.—The defendant is the appellant in this case. The facts are shortly these: One Joyram Lal Mahata executed a will on the 22nd April 1878, whereby amongst other things, he bequeathed a sum of Rs. 5,000 to his son's daughter, Jodha Bibi, to be paid to her out of a certain sum of money that was due to him from the Maharajah of Bettia. The testator died on the 2nd February 1881, and Jodha predeceased him, having died in October 1879. The plaintiff Binda Bibi, who is the daughter of Jodha Bibi, was, of course, born before the death of Joyram Lal; and the money out of which the legacy to Jodha Bibi was to be paid was realized from the Maharajah of Bettia on the 7th December 1884.

That being the state of things, the plaintiff, Binda Bibi, brought this suit to recover the sum of Rs. 5,000, with interest, upon the ground that she was the sole heir of Jodha Bibi.

The defence was that the bequest had failed by reason of Jodha Bibi having predeceased the testator.

The Court below overruled this objection, and gave the plaintiff a decree according to the provisions of s. 96 of the Indian Succession Act which applies to wills of Hindus, holding that as the bequest was in favour of a lineal descendant of the testator, and as that lineal descendant died leaving issue, the bequest did not lapse.

The defendant has appealed and the two objections urged on his behalf are, first, that even if s. 96 of the Indian Succession Act was applicable to this case, still, there being a clear intention in the will, inferable from other provisions in that document, that the legacy to Jodha Bibi should lapse in the event of her predeceasing the testator, the Court below was wrong in giving the plaintiff a decree; and, in the second place, that though s. 2 of the Hindu Wills Act makes s. 96 of the Succession Act applicable to wills of Hindus, generally, yet, having regard to the provisions of s. 3, it must

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be held that s. 96 cannot operate in favour of the plaintiff so as to prevent the lapsing of the legacy.

With regard to the former of these two contentions, we think there is nothing in it. The provision of the will to which reference was made, as indicating a contrary intention, is a bequest in favour of one Ram Churn Lal, the brother of the testator, that provision being to the effect that the legacy is bequeathed to Ram Churn Lal, and, in case of his death, to his sons and grandsons. It has been contended that as there is no similar provision in the case of the bequest to Jodha Bibi, we must take it that the bequest to Jodha Bibi was for her personal benefit alone. We do not think that any such inference follows. In construing this will, we must take it, that the testator knew the law that governed his case; and if, under that law, s. 96 of the Succession Act could prevent a lapse in the case of a bequest to a lineal descendant, it was not necessary for the testator to have made any provision in the case of the bequest to Jodha Bibi, such as he has made in the case of the bequest to Ram Churn Lal, in whose case there is not a similar rule for preventing the legacy from lapsing. Therefore, the question of a contrary intention, being inferable, depends upon the other question, *viz.*, whether s. 96 applies to this will.

This brings us then to the second contention raised by the learned counsel for the appellant. That contention is sought to be supported in this way. It is urged that the parties being Hindus, and it being a settled rule of Hindu law as laid down in the *Tagore case*, that none but a person in existence, either in fact or in the contemplation of law, can take a bequest under a will, to allow s. 96 to have operation in this case in enabling Jodha Bibi to take a bequest at a time when she was dead, would be in direct contravention of that rule. And, in support of this contention, the case of *Alangamonjori Dabee* v. *Sonamoni Dabee* (1) is referred to. That case no doubt puts a comprehensive meaning upon the language of the last clause of s. 3 of the Hindu Wills Act, and would apparently lend some support to the appellant's contention. But the facts of that case were not the same as the facts in the present case, and all we need,

(1) I. L. R., 8 Calc., 657.

therefore, say about that case is that it cannot be taken as governing the one now before us.

In the present case the mode in which the bequest to Jodha Bibi has been construed by the Court below and has to be construed under the provisions of s. 96 of the Indian Succession Act, is one that comes, in our opinion, within the rule in the *Tagore case* (1) which is laid down in these terms: 'A person capable of taking under a will, must, either in fact or in contemplation of law, be in existence at the death of the testator.' Now, Jodha Bibi was, in the contemplation of law as provided in s. 96, a person in existence at the time of the testator's death, because a lineal descendant of hers survived the testator. That being so, we do not think that by giving effect to this bequest, the rule in the *Tagore case* is in any way contravened.

It was urged that when that rule speaks of a person being in existence in the contemplation of law, the law referred to must be taken to be the Hindu law. We do not think that that is so, for in the judgment in the *Tagore case* we find that their Lordships, when speaking of a person in embryo as being a person in existence, referred to general principles of jurisprudence for coming to that conclusion and not to any specific rule of Hindu law.

We may also observe that the effect of our upholding this bequest is to make the legacy vest in Binda Bibi, a person who was in existence at the time of the testator's death, so that, in fact, the application of s. 96 does not lead to the creation of any estate which the testator could not have created under the Hindu law. We think, therefore, the judgment of the Court below upon this point ought to be upheld.

An objection was taken that the Court below was wrong in allowing interest upon the legacy; but we do not think that objection to be of any weight, having regard to the provisions of s. 131 of the Probate and Administration Act.

The result is that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

(1) 9 B. L. R., 377.